THEFT OF VALUABLE COINS: IMPACT ON INNOCENT COLLECTORS

This presentation is in response to Mr. Eric Newman's summary of the ANS's position on the theft of their coins, as he spoke at the ANA Convention this past August. During and after that meeting, the concern of many of us had to be the impact on an innocent purchaser. Throughout this room are many who are, or could become, the innocent purchasers of coins or other objects of art which may have been stolen -- not necessarily by the person from whom you purchased, but by some unknown person earlier in the chain of title.

It's not my intention tonight to debate with Mr. Newman -- whose presentation I considered fair and reasonable -- but my purpose would be to explore the role of an innocent buyer in this unfortunate mess and how it impacts upon us as collectors in Illinois.

To determine if there is another side to this controversy, I secured the Briefs of Mr. Naftzger, who claimed to be an innocent purchaser -- but lost in court. By way of background, I should first give the context in which this case arose.

The case was concerned with 58 coins minted by the United States Mint in Philadelphia between 1793 and 1857. These 58 coins were part of a 1,000-plus copper large cents collection donated by George H. Clapp to ANS in 1937. ANS took physical possession of the Clapp collection in late 1946. At some time after ANS' receipt of the Clapp collection and before 1973, a number of coins were surreptitiously stolen from the Clapp collection by someone who replaced the Clapp coins with coins of the same variety but of inferior grade. Using circumstantial evidence, ANS presented the following scenario of how the theft by substitution was accomplished: The late William Sheldon, a preeminent classifier, cataloguer and collector of large cents, lived near the ANS until 1973. During that time, Sheldon spent much time at ANS, unguarded, examining the Clapp collection. In 1973-1974, the ANS catalogued its Clapp collection and discovered that some of the coins had been switched for inferior coins of the same variety. In 1988, Delmar Bland, a leading scholar of large cents, began studying ANS' Clapp collection to determine which specific coins were missing. Bland delivered his report to ANS in December, 1990. Bland's report identified 129 coins as missing from the Clapp collection, 128 of them having been stolen by substitution. In February, 1991, ANS made the Bland report public. That July, the Bland report was disseminated to members of Early American Coppers, Inc. (EAC), an organization of dealers and collectors of early American copper coins. Naftzger, an EAC member, presumably received a copy of the Bland report that month. In August, 1991, William C. Noyes published a book of pedigrees and photographs of prominent large copper cents. (Noyes, United States Large Cents 1793-1814 [1991].) Pictured in Noyes' book were certain coins listed as belonging to Naftzger, which he had acquired from Sheldon. Upon seeing those photographs, ANS identified Naftzger's coins as among those missing from the Clapp collection. By letter dated December 12, 1991, ANS notified Naftzger that some of his coins pictured in Noyes' book appeared to be among those determined to be missing from ANS' Clapp collection. Naftzger's reply, dated January 20, 1992, denied any knowledge of ANS' missing coins. On March 1, 1993, Naftzger filed suit against ANS in Los Angeles County Superior Court, seeking declaratory relief and to quiet title to the disputed coins in his possession, and, on May 24, 1993, ANS filed its answer and cross-complaint also seeking to recover and quiet title to the disputed coins. The rest is history.

You may recall that the 1996 ruling in California decided that the ANS was entitled to recover the coins purchased by the innocent buyer because title cannot be acquired through a chain

of title involving a theft of that coin. The second case established that the innocent buyer, refusing to return the stolen coin, could be subjected to a penalty of treble damages for his withholding possession.

My approach was to:

(a) Procure and analyze both California Appellate Court opinions, as well as that of the Supreme Court (decided after Mr. Newman's presentation);

(b) Procure the Briefs of Naftzger, the loser, for analysis. These arguments for the ANS were fairly well incorporated into the Appellate Court opinions -- but were rejected; and

(c) Analyze law of other States, Illinois in particular, to see if a different result might have been had if the coin had been located in a State other than California, where the law might have differed.

First, I'll deal with the issue of ownership of a coin that had been stolen. The California court stated (49 Cal.R.2d 784, 788):

> "Under the facts as pled, Naftzger is innocent of any wrongdoing and was unaware of the theft when he purchased the coins. Even if Naftzger is an innocent purchaser, however, he did not acquire valid title to the coins, assuming they were stolen, because a thief cannot transfer valid title. On this record, Naftzger's obligation to return the coins will be established if and when the museum proves the coins are its stolen property."

Therefore, ANS had to prove that the property held by Naftzger was the property stolen from the Museum. This may not be so simple in the instance of coins where multiple copies of the same item, in the same condition, may be on the market and in other private or public collections. A proper defense on this aspect might be to have an expert testify as to the total number minted, as to those he has actually observed in the condition claimed by the owner, and as to the possibility that the defendant might own a coin other than that claimed by the owner. The impact of this argument could be refuted by a pedigree, if it is shown that the coin in question came from a chain through Mr. Sheldon. However, Sheldon, having been an expert in 1793-1857 copper cents, could have owned multiple copies of a particular coin in that same condition.

However, the photos taken of the particular coins donated to the ANS by Mr. Clapp, when compared with photos taken by Mr. Naftzger and by the seller to Mr. Naftzger, might have revealed scratch lines or other highlights which could prove they are identical.

It should be pointed out that a further issue on which the 1996 case turned was the Statute of Limitations, that is, the time in which a suit must be brought to recover a stolen item. The conflict, both in California and in Illinois, would be the time elapsed between the date of theft and the date of discovery. I will not dwell on this, because I feel that most courts would concur that the date of discovery applies.

For purposes of settling title, although the California court did not cite the Uniform Commercial Code, it is clear that the Code would govern the law on the issue of ownership. In Illinois, 810 ILCS 5/2-403 states:

> **Section 2-403.** Power to transfer; good faith purchase of goods; "entrusting." (1) A purchaser of goods acquires all title which his transferor had or had

> power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value . . ."

Section 403 goes on to discuss what happens if the owner entrusts the item to a party who sells it to an innocent buyer (such as use of a dealer on consignment), but obviously ANS never entrusted its coins in that manner.

In Illinois, the only case directly on point is that of Tigue v. Flanigan, 334 Ill.App. 73, 78 N.E. 2d 343, decided downstate in 1948. There, an auto was stolen from Tigue and purchased innocently by Flanigan. Of course, one might ask how innocent can a buyer be when title must be evidenced by records of the Secretary of State? Well, the innocent buyer proved the complete chain from the real owner (an auto dealer in Iowa) to himself -- the only problem being that one of the intermediate transfers was based upon a forgery of the signature of the seller, a forgery of the notary public's signature, coupled with proof that the car had been stolen from the lot of an intermediate innocent buyer and that the notary seal had also been stolen -- and that both thefts had been reported to the police promptly. In the ANS case, the thefts had not been reported until 1990. That was the date of discovery of the theft, from which our 5-year Statute of Limitations would begin to run. But does the discovery rule also require the identity of the culprit and the current location of the goods stolen?

In Illinois, two Statutes would apply on that issue:

> **5/13-205: Five year limitation**
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> [A]ctions . . . to recover the possession of personal property or damages for the detention or conversion thereof . . . shall be commenced within 5 years next after the cause of action accrued.

Case law under that Section 205 holds that the "cause of action accrued" upon discovery of the theft. However, Illinois cases rule that "discovery" is when the real owner "knows or reasonably should know" of the loss. Should ANS have been under a burden of periodic physical examination of its holdings? In other words, where the thefts occurred prior to 1970, and the discovery was made in 1990, were the curators of the ANS under a burden to examine the coins periodically during that 20-year period to determine their holdings and, thus, they "reasonably" should have known of the theft much earlier? If 128 of the 129 coins in question were substitutions, but the 129th was actually missing (and not substituted), shouldn't the ANS have noted that gap in its holdings somewhat earlier, and have been held to a beginning of the discovery rule whenever defendant can prove they made their first periodic examination of their holdings? Illinois cases may not be as liberal in this regard as California.

The second Illinois applicable Statute is 735 ILCS 5/13-215, which provides:

> Fraudulent concealment. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

If anyone in Illinois suspected that he had one of the ANS coins, and concealed that knowledge, he certainly could not defend properly, based upon this Statute. Mr. Naftzger was an innocent

purchaser, but the ANS' 5-years would commence whenever the Museum discovered the loss. Illinois cases hold that mere silence of the defendant does not constitute a fraudulent concealment, and there must be some affirmative act of the defendant designed to conceal a possible cause of action.

At the time of the Tigue case in 1948, the Illinois Statute was quite specific (Ch. 121-1/2, Section 23):

Section 23. Sale by a person not the owner

(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

That specific Statute was repealed in 1962, and, although our current Section 403 Statute is not quite as concise in its terminology, the authority of the Tigue case would certainly go a long way in proving that ownership of stolen property remains in the original owner.

There are other reported cases in Illinois dealing with the rights of an innocent purchaser to property earlier stolen, but the Tigue case may be the most significant for purposes of this discussion.

From our standpoint as innocent buyers, it is significant to concern ourselves with the status of the party from whom we purchase. Our purchases would be from dealers, auctioneers or other collectors -- or even by gift or inheritance. How are we to know if their chain of title is clean? There are even customs in the coin trade of placing a coin on consignment. Under those circumstances, we are concerned with what is known as "voidable title," and we assume that the seller to us will negate the voidable title problem by payment of the appropriate proceeds to the prior owner. If not, buyers have a further concern.

I examined higher court decisions in other States in the area of "Jewelry and Art" as somewhat analogous to our situation. Rings and paintings may be unique but are often delivered on consignment. In the New York case of Porter v. Wertz, 26 UCC Rep.Serv. 876, 68 AD 2d 141, 416 NYS 2d 254 (1979), it was clear that the individual from whom the defendant gallery owner purchased a Utrillo painting was not an art dealer and did not hold himself out as one; therefore, defendant did not come within the definition of a buyer in the ordinary course of business. In addition, defendant was not "a person in good faith" in the transaction, in that he made no effort to determine the status of the seller or to verify if he was the owner of the painting or in rightful possession of it or was authorized by the owner to offer it for sale, despite having several methods of doing so easily available. Consequently, defendant was not protected by statutory estoppel under Section 2-403(2). The plaintiff who owned the Utrillo painting, but allowed X to borrow the painting pending his decision on whether or not to purchase it, was entitled to recover the painting or its value from defendant. Defendant was an art dealer to whom the painting had been sold by Y, an acquaintance of X whose name X had used in certain art transactions. Defendant was not protected by the "entrustment", because (1) he did not purchase from the person (X) to whom plaintiff had entrusted the painting, (2) Y was not an art merchant and (3) the sale was not in the ordinary course of Y's business because he did not deal in goods of that kind. Porter v. Wertz, 30 UCC Rep.Serv. 1582, 53 NY 2d 696, 439 NYS 2d 105, 421 NE 2d 500 (1982).

For those concerned further with the problem of purchase of goods on consignment (ranging from jewelry, cars, mobile homes, works of art and even Hitler's personal belongings), I would direct your research to UCC, Sales, Case Digest, Section 2403.11(8). That, however, was not an issue in the ANS case, but can furnish insight into the problem when you purchase from one who has the item on consignment.

Perhaps this is an appropriate point at which to discuss the Naftzger side of the case -- the evidence he presented but does not appear in the Court published Opinions. He argued three major points of law.

The first was whether the period of limitation for an action for taking or detaining chattels allows ANS to delay suit until it discovers the whereabouts of the property, even when it has failed to act with reasonable diligence. Some of the evidence Naftzger presented on this issue included the following: George Clapp, born in 1858, amassed one of the largest collections of large cents ever seen. On January 6, 1937, Clapp signed a deed of gift which stated his intent to deliver 1,350 large cents to the ANS. The coins were not delivered to the ANS until December 19, 1946. The deed to the ANS contains no individual descriptions of the coins, and no photographs were attached. Clapp continued to buy, sell and trade the coins covered by the deed until, and even after, he physically delivered them to the ANS. No inventory accompanied the coins when they were delivered to the ANS, and the ANS neither made an inventory nor took any photographs. Each coin was in a box that contained a description of a coin, but the coins were not compared to the descriptions. In early 1943, Clapp's son-in-law, Collin, took photographs of some of the coins then in Clapp's collection. The quality of the photographs was so poor that they were rejected by the ANS curators as "not showing a true picture" of the coins, and, in the words of the ANS curator responsible for conducting an inventory of the coins in 1974, were "just about useless." On March 23, 1947, Clapp informed the ANS that he had completed a checklist of the coins. The ANS failed to produce the original list, stating that it could not be located. The ANS ignored the list until 1974, when a curator compared it to the coins in the ANS collection and concluded that approximately 70 of the coins on the list were not at the ANS. In early 1973, two ANS curators, Brady and Grunthal, began an inventory of its early cents collection. In May, 1974, Doty, now curator of coins at the National Museum of American History of the Smithsonian Institute, took over. Brady, Grunthal and Doty concluded that approximately 70 of the Clapp coins were not in the collection. When Doty brought this to the attention of other curators and to Elam, the Director of the ANS, he was told that the ANS had known for years that Sheldon had switched the coins "shortly after the ANS got them" by "substituting worse coins for better ones." "They had found that a switch had taken place . . . quite early on, back when the coins came to the ANS or shortly thereafter and that Sheldon had done it." Elam, the ANS Director, testified that he had been told by Grunthal, the chief curator in the 1960's, that the switches had occurred "with the permission or acquiescence" of the ANS. This information was the subject of an ANS memorandum dated August 11, 1990. Elam also testified that he did nothing from the 1960's to 1972 to explore the switches and admitted that the Grunthal/Doty inventory was begun in 1972 in response to knowledge of the switches. Elam also heard Bass, the ANS president from 1978 to 1984, state that he believed that coins had been switched. Metcalf, the chief curator of the ANS, wrote a memorandum on October 31, 1990, stating that he had heard Bass say the same and acknowledged that it should have been investigated earlier. From 1974 to 1986, the ANS made no effort to recover the missing coins. Instead, the ANS presented Sheldon with an award lauding him as "author, teacher, medical researcher, numismatent and physician." In 1972, Naftzger purchased Sheldon's collection of approximately 300 cents for

$300,000. After adding them to his collection, Naftzger consigned over 200 coins, approximately 60 of them purchased from Sheldon, to be sold at auction in New York City in 1973. The auction catalog had photographs of the coins and noted that Naftzger had purchased coins from Sheldon. The catalog was mailed to more than 2,000 collectors and to the ANS, which still has it in its library. The sale was advertised in the Wall Street Journal, Coin World and the American Numismatic Association Journal. The trial court concluded that several of the coins that had been given to the ANS by Clapp were sold by Naftzger at this auction. In 1988, the ANS hired Bland to create a list of missing Clapp coins. In December, 1990, Bland reported that 129 coins were missing. In 1991, Noyes published United States Large Cents 1793-1814 that contained photographs and pedigrees of many coins, including many of those on Bland's list, and many of Naftzger's coins which Naftzger had permitted Noyes to photograph, together with the names of their present owners. In 1991, the ANS contacted Naftzger and asked him for information concerning his collection. Naftzger replied and asked that the ANS provide him with information establishing that the ANS owned the coins in question. The ANS never complied. In 1992, Naftzger agreed to sell his collection, and he consigned the collection to Stacks, the auction house, and asked Stacks to evaluate the collection and directed it not to offer for sale any coins that, in its opinion, came from the ANS collection.

On this point, Naftzger argued that there should be a requirement of due diligence on the part of ANS and that this question of law is enormously important to commerce, because "there is no possibility of certainty of ownership, no matter that a seller has a provenance of more than one hundred years which documents multiple good faith purchases for value." Naftzger argued unsuccessfully that "the ANS knew that Sheldon had switched coins but did nothing either to locate the missing coins or to give notice to the public that they were missing. Neither a police report nor an insurance claim was filed, and no steps were taken to alert the collecting community. Had the ANS shared its knowledge with the collecting public, neither Naftzger, nor any other collector, would have purchased the Sheldon collection."

Naftzger argued that:

> The discovery rule, with a requirement of due diligence, has been applied by other jurisdictions in cases involving stolen art. In O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980), the court held that "O'Keefe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action . . ." Id. at 870. The duty of due diligence exists also in Pennsylvania, Maryland, Indiana and the District of Columbia. Erisoty v. Rizik, 1995 U.S. Dist. Lexis 2096 28 n. 5 (E.D. Pa. February 23, 1995), aff'd., 1996 U.S. App. Lexis 14999 (3rd Cir. April 30, 1996); Autocephalous Greek-Orthodox Church of Cypress v. Goldberg & Feldman Fine Arts, Inc., 717 F.Supp. 1374, 1386 (S.D. Ind. 1989), aff'd., 917 F. 2d 278 (7th Cir. 1990), cert. denied, 502 U.S. 1050 (1992)(applying Indiana law, the statute of limitations "commences to run from the date the plaintiff knew or should have discovered that the plaintiff suffered an actual injury . . ."; a person who seeks protection of the discovery rule "has a duty to use reasonable diligence to locate the stolen items"); see also Republic of Turkey v. OKS Partners, 797 F.Supp. 64, 69-70 (D.Mass. 1992).
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> Even New York, which follows a demand rule without a statutory diligence requirement, permits the defendant to assert the defense of laches in cases involving allegedly

stolen artwork. See Solomon R. Guggenheim Foundation v. Lubell, 569 N.E. 2d 426, 427 (1991).

> The evil of not requiring due diligence in these circumstances is amply demonstrated by this case. The entire case could have been avoided had the ANS taken simple steps to alert the collecting community to what it believed, that Sheldon had switched coins out of the Clapp collection. Instead, it affirmatively concealed the information and delayed for forty years, knowing that these coins would be traded and sold numerous times throughout the collecting community. The ANS has spawned an endless round of lawsuits concerning these coins. Indeed, the ANS has now filed a lawsuit in the United States District Court for the Central District of California to recover additional coins, which it claims to have owned and lost fifty years ago, from several innocent purchasers. The uncertainties incumbent in the fact-finding process in these circumstances are manifest.

In Illinois, there are reported cases on both sides of the fence, but I think our Courts would generally rule that no one can acquire title superior to that of the original owner. The issue then becomes not so much the good faith of the bona fide purchaser, but how diligent the owner was in pursuing his property, as well as the extent to which the buyers tried to verify the authenticity of the right of their sellers to purport to give them good title.

The second major argument related to what Naftzger suggested was a new rule of damages for civil conversion actions by automatically awarding ANS the trebled damages, attorneys' fees and costs. On appeal, Naftzger contended that the treble damages statute (Pen.Code Section 496, subd.[c]) does not apply to him because he was never convicted of violating Penal Code section 496, subdivision (a).

The Court properly pointed out that "[t]he word 'convicted,' however, appears nowhere in Penal Code section 496, subdivision (c). In construing a similar type of statute, the Court had concluded in Heritage Cablevision of Cal., Inc. v. Pusateri (1995) 38 Cal.App. 4th 517, 521, that the phrase, "person who violates" (Pen.Code 593d, subd.[d]), requires no prefatory criminal conviction. Heritage Cablevision held that Penal Code section 593d, subdivision (d)'s civil penalties, including treble damages and attorney fees, could be awarded against a "person who violates" the statute's prohibition against tampering with cable television systems, even absent a prior criminal conviction. We agree with the court's reasoning in Heritage Cablevision and conclude a prior Penal Code section 496 criminal conviction is not a prerequisite for civil liability under Penal Code section 496, subdivision (c)."

Perhaps a different tack might have been successful. One violates the California Code if he knew the property to be stolen, and there was enough in the record that he may have had no reason to know it was stolen when Naftzger made his purchase.

A side issue was raised about what I will refer to as the "Clarke" coins. These involved sales by Sheldon to others and not directly to Sheldon.

It appears that Section 496 requires that the person charged knows that the property has been stolen. The Court of Appeal had held that the trial court's finding was that Naftzger had knowingly sold stolen coins in 1973. Yet, that Court stated that Naftzger,

> "while examining Sheldon's collection in anticipation of purchasing it, found the missing Clarke coins in Sheldon's

collection. Naftzger deduced that Sheldon had switched the Clarke coins with similar coins of inferior grade."

There was no evidence, however, that Naftzger had any inkling that any of the Clarke events involved the ANS in any way, either in 1972, or when he sold duplicate coins that he obtained from Sheldon, in 1973. The Court of Appeal stated that Naftzger assigned false pedigrees to several of the Clarke coins in a 1973 auction. However, the pedigrees contained in that auction catalog state that the coins sold went from Sheldon to Payne to Clarke to Naftzger or from Sheldon to Clarke to Naftzger, and those pedigrees have never been challenged by anyone. Further, there was no evidence that Naftzger had any knowledge, prior to 1978, that there had been any switches at the ANS. There was correspondence from Naftzger that negates any view that he had had any inkling of any ANS switches prior to 1978. The letters to and from Loring have nothing to do with the ANS, but with Naftzger's discovery that Sheldon had not given him six coins that Naftzger thought he had purchased from Sheldon in 1973. Naftzger's October 17, 1976 letter to Loring states that the only other evidence that anyone had informed Naftzger that Sheldon had switched any coins at the ANS were five notes from Bland to Naftzger. The first was dated in 1978, and the last in 1984, and they concern a total of 5 coins. The letters merely assert Bland's opinion that Sheldon might have "exchanged" coins with the ANS under unknown circumstances. Bland later testified at trial that he had no personal knowledge of the circumstances surrounding the acquisition of any of the coins by Sheldon.

Although the Court of Appeal quotes the trial court's view that Naftzger's sale of his collection to Streiner in 1992 ignored the ANS. The uncontradicted evidence is to the contrary. Naftzger delivered his collection to Stacks, the preeminent auction house for coins in the United States, with instructions to verify that none of the coins belonged to the ANS before they were sold. Harvey Stack wrote to Naftzger on February 11, 1992, stating his awareness of the ANS' interest in the coins and his opinion that none of them was described in the ANS-Bland list of missing coins.

He argued that no reported decision has held that the penalty provided by Section 496(c) of the Criminal Code is available in a civil action, where there has been no criminal conviction, and that the only case cited by the Court of Appeal in support of its position, Heritage Cable Vision considered a different statute and cites no case in support of its view that a punish-ment for a crime, pointedly omitted by the Legislature from the statutes which detail available civil remedies, can be made available by a mere preponderance of the evidence decision in a civil proceeding. The Heritage decision depends entirely on an interpretation of the word "violates" taken from a dictionary and out of the context of the Penal Code. One cannot be found to have violated the Penal Code, and thus be subject to its penal-ties, unless all of the appropriate constitutional, statutory and decisional safeguards which apply to criminal proceedings are accorded. None of these was afforded Naftzger in his civil bench trial.

This extremely serious aspect of the California decisions involved Punitive Damages -- treble the amount of the actual damages. At this moment, however, this is probably not a viable concern in Illinois.

The purpose of exemplary, or punitive, damages is to punish a person for doing a wrongful act and to discourage that person and others from similar conduct in the future. Under a 1995 Statute (735 ILCS 5/2-1115.05), Illinois enacted a Tort Reform Statute which attempted to limit Punitive damages. Then, in 1997, the entire Act was declared unconstitutional (Best v. Taylor Machine Works, 228 Ill.Dec. 636, 179 Ill. 2d 367), leaving

us back where we were prior to 1995, relying upon case law of earlier vintage. Those cases held that Punitive damages may be awarded (1) when a tort is committed with fraud, actual malice, deliberate violence or oppression, or (2) when the defendant acts willfully or with gross negligence, indicating a wanton disregard of the rights of others. In order to recover Punitive damages, fraud, malice or one of these other matters in aggravation must be alleged. Generally, Punitive damages were not recoverable for breach of contract, even if the breach had been willful and wanton. The exception to the rule was where the breach amounted to an independent tort and there was malice, wantonness, oppression or other conduct beyond that required to establish the breach. For causes of action accruing on or after March 9, 1995, the amount of Punitive damages that could have been awarded for a claim in any civil action under the Statute could not exceed three times the amount awarded to the claimant for the economic damages on which the claim is based. However, the limitation on the amount of Punitive damages that may be awarded does not apply in a case where a plaintiff seeks damages against an individual on account of death, bodily injury or physical damage to property based on any theory or doctrine due to an incident or occurrence for which the individual has been charged and convicted of a criminal act for which a period of incarceration is or may be a part of the sentence. In addition, Punitive damages were not recoverable under the Survival Act or the Illinois Insurance Code. However, they are available for accounting malpractice. Punitive damages may not be awarded under the Consumer Fraud and Deceptive Business Practices Act against a party defendant who is a new or used vehicle dealer, pursuant to the Illinois Vehicle Code, unless the conduct engaged in was willful or intentional and done with evil motive or reckless indifference to the rights of others. Therefore, under the current state of Punitive Damages law in Illinois, Naftzger would have prevailed.

Given the typical nature of a transaction of purchase by the average collector among us, we do not fall into the categories of malice, wantonness, oppression, evil motive or reckless indifference which would activate a claim for Punitive damages. However, if you are about to buy a large cent for a substantial price, a cautious buyer would first procure a photo of the item and submit it to the ANS for verification that it is not among the coins it claims are still missing. Bear in mind that the Naftzger purchase involved only 58 of those 129, and your contemplated purchase may be among those not yet accounted for. With its success in the Naftzger case, we are told that the ANS has filed another suit in the Sacramento area, where it claims to have located other coins it claims were among the Sheldon substitutes.

On the positive side of concern on our part in Illinois is the fact that the California Court relied upon the specific Statute allowing treble damages for this type of instance. Their Statute, Section 496 of the California Code of Civil Procedure, Penal Division, Title 13, dealt with criminal punishment for "Receiving Stolen Property," and in part (c) states:

> (c) Any person who has been injured by a violation of subsection (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit and reasonable attorney's fees.

As of this date, Illinois has no such provision on civil penalties in its Criminal Code.

The third major argument he made involved whether or not Naftzger acquired title by adverse possession. We in Illinois think that the doctrine of "adverse possession" relates only to real estate, but, in recent years, Courts around the country have expanded it to cover other aspects of property. The California Court had not addressed the question of whether adverse possession applies also to personal property. In San Francisco Credit

Clearing House v. Wells, 196 Cal. 701, 707 (1925), however, the Court of Appeal had applied the doctrine to personal property. In Treager v. Friedman, 79 Cal.App. 2d 151 (1947), the Court found that title to four apartment houses, and the furnishings and personal property contained in them, had been gained through adverse possession. The availability of the doctrine, given the requisite level of proof, was recognized recently in Society of Cal. Pioneers v. Baker, 43 Cal.App. 4th 774, 786 (1996). In addition, other jurisdictions have applied the doctrine to chattels. See Cotton v. United States, 371 F.2d 385, 391 (9th Cir. 1967)("Even the thief of a chattel can acquire title to it by adverse possession"); Gee v. CBS, Inc., 471 F.Supp. 600, 653 (E.D. Pa. 1979)("The doctrine of adverse possession applies with equal force to personal property, or at least to chattels"); Keim v. Louisiana Historical Assoc. Confederate War Museum, 48 F.3d 362, 364-65 (8th Cir. 1995)(purchaser of stolen flag acquired title under doctrine of adverse possession).

The rationale for the application of the doctrine to personal property is that commercial certainty requires protection. That consideration is particularly strong in this case, where the ANS had knowledge that Sheldon had the coins and yet not only did nothing for more than forty years to give notice to anyone of this knowledge, but actually concealed it, thus allowing the collecting community to rely on the presumption of ownership that possession creates. Naftzger has met the requirements of establishing adverse possession of the coins. He has possessed them for at least five years in an open and notorious and continuous fashion, in a manner that was hostile to the ANS and under a claim of title. The assertion of the California Court that his possession was not open should not stand in light of Naftzger's 1973 sale, which identified Sheldon, and of Noyes' 1991 photographs of Naftzger's collection, taken with Naftzger's permission, which identified him as the owner.

I was impressed by Naftzger's argument on this point, but perhaps there is a change in the making in this concept. A recent 45-page article appeared in the Buffalo Law Review, suggesting that change: Gerstenblith, The Adverse Possession of Personal Property, 37 Buff LR 119 (1989).

A further source of careful analysis appears in a lengthy 1986 Northwestern University Law Review, Volume 80, page 1221, by University of Chicago Law Professor R.H. Helmholz, entitled, Wrongful Possession of Chattels: Hornbook Law and Case Law. We have heard the expression that "possession is 9/10ths of the law" -- but this is far from accurate. In weighing open possession and statutory periods of limitations against the failure of a rightful owner to secure his rights, Professor Helmholz states (p. 1336-7):

> "In this situation, American courts have called upon the hornbook rule of simple possession when the equities have favored the bona fide purchaser. For title to accrue to the purchaser, three things generally must exist: (1) honesty on the part of the purchaser; (2) open use by him for the statutory period; and (3) failure on the part of the owner to take reasonable steps to secure his rights ... Analysis in many of the reported cases has been focused on whether the rightful owner has had a real chance to claim the item stolen. Accordingly, courts frequently have emphasized that only 'open possession' counts for purposes of applying the statute of limitations. They have stressed that the law is 'not meant to help parties who take no pains to see what is before their eyes.' Yet, lack of honest conduct on the part of the possessor also will doom the possessory claim, even if the possessor has purchased for value ... It cannot be said that the American cases involving bona fide purchasers of stolen goods have been altogether harmonious. Courts within the same jurisdiction

> may reach seemingly contradictory results, sometimes allowing the statute of limitations as a bar, sometimes not. Nevertheless, virtually all the cases in which courts have allowed possession to ripen into title have involved good-faith takers of the property. There must be a title-clearing mechanism for chattels, and the bona fide purchase largely serves that function. The evident wrongdoer, the out-and-out thief and the willful defrauder cannot set up the statute of limitations as a defense to actions brought to recover the chattel or its value. Contrary to what Dean Ames wrote, it is not the simple passage of years that cures the 'vice' of wrongful possession. It is honesty."

Had the California Court read this article, and the trend it suggests, perhaps Mr. Naftzger would have prevailed.

I hope these comments and the detailed printed material I prepared will help all of you understand better the controversy, the risks inherent in purchase of particularly rare coins, the distinctions between California and Illinois and the need to be vigilant and knowledgeable. Thank you.